SUPREME COURT, U. S.

No. 195

JUL 2 1969

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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LAWRENCE D. SULLIVAN, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 2a-8a) are not officially reported. The court of appeals affirmed without opinion. (Pet. 1a.)

### JURISDICTION

The judgment of the court of appeals was entered on March 6, 1969. (Pet. 1a.) The petition for a writ of certiorari was filed on June 4, 1969. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, and to what extent, petitioner is entitled to a deduction for transportation expenses incurred while driving his car, with some thirty-two pounds of tools in it, between his residence and his work sites.

## STATUTE INVOLVED

The pertinent portions of Sections 162(a) and 262 of the Internal Revenue Code of 1954 are printed in the Appendix, *infra*, p. 6.

## STATEMENT

In 1965 the Tax Court (45 T.C. 217) sustained the Commissioner's determination and held that petitioner was not entitled to any deduction on his 1962 income tax return for transportation expenses, assertedly $1,494.72, incurred in driving his car to and from his residence and various work sites. (Pet. 13a-20a.) Petitioner had claimed a deduction was justified because he transported a tool bag measuring some 6 x 18 x 24 inches and weighing about 32 pounds. (Pet. 14a.)

On appeal, the Second Circuit rejected the total deduction petitioner claimed but reversed the Tax Court's decision and remanded the case. The Tax Court was directed to determine first whether it was necessary for petitioner to transport his tools to and from work, and if so and storage of the tools was feasible, the cost of storage was to represent the

maximum allowable deduction. Second, the Tax Court was to determine whether petitioner would have driven to work "but for" the necessity of transporting the tools; if not, respondent was to be allowed a tool transportation deduction subject to the above maximum; if so, the expenses were to be allocated between the cost of transporting petitioner himself and his tools, again subject to the above maximum. Third, assuming that storage was not feasible and that petitioner would have driven to work regardless, the Tax Court was to determine how much of the claimed deduction constituted reasonable transportation expenses. (Pet. 9a-12a.)

On remand, petitioner conceded that the total transportation expense in 1962 was only $409.70. (Pet. 3a.) Some additional evidence was introduced. The Tax Court found, *inter alia*, that it was necessary for petitioner to transport the tools to and from work, that storage was not feasible and that petitioner would have driven to work even if it had not been necessary to transport the tools. On the basis of the latter finding, and pursuant to the Second Circuit's direction, the Tax Court allocated one third of the expenses, or $136.57, to the transportation of the tools (Pet. 2a-8a). The Second Circuit affirmed without opinion (Pet. 1a).

## ARGUMENT

The decision below does not deny petitioner any deduction to which he is entitled. There is no conflict of decisions or other ground for further review.

1. Once it is determined that a taxpayer would drive to work regardless of the need for transporting tools, his driving is commuting and nothing else. There is simply no basis for deducting any expenses. See *United States* v. *Correll*, 389 U.S. 299, 303; compare Rev. Rul. 63-100, 1963-1 Cum. Bull. 34.

To hold, as the courts below now have, that one third of the driving costs are allocable to carrying petitioner's tools and deductible is generous in the extreme, in view of the Tax Court's finding that petitioner would have driven his car to work in any event, and petitioner's concession on brief below that the tool transportation did not increase his driving expenses. No conceivable theory would justify a larger deduction.

2. The decision here is consistent with the other appellate decision on point, *Tyne* v. *Commissioner*, 385 F. 2d 40 (C.A. 7). The Seventh Circuit reversed the Tax Court, which had denied any deduction for tool transportation, and remanded the case with instructions that the Commissioner of Internal Revenue determine a proper allocation for that purpose. On remand, the Commissioner determined that 50 per cent of the total expenses was allocable to tool transportation, and the Tax Court found accordingly. A second appeal was taken in which the Seventh Circuit again reversed and remanded for a determination whether the taxpayer had satisfied the "but for" test of Rev. Rul. 63-100, *supra*, in which event, in the appellate court's view, he would be entitled to a 100% deduction for the expenses incurred.

3. There is not a conflict with *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9). Although that case did involve the transportation of tools, the decision turned on whether taxpayer was entitled to deduct "traveling expenses * * * while away from home," within the meaning of Section 162(a)(2) of the Internal Revenue Code of 1954 (as the Ninth Circuit subsequently made clear in *Mathews* v. *Commissioner*, 310 F. 2d 98). Here, concededly, petitioner did not incur the claimed transportation expenses "while away from home."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1969.

## APPENDIX

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

* * * *

(26 U.S.C. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 262.)

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